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April 17, 1992

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

Re: Planned Parenthood of Southeastern Pennsylvania v. Casey, No. 91-744

Dear Mr. Suter:

On April 6, 1992, the State of Utah filed an amicus brief supporting respondents in the above-captioned case. On April 10, 1992, the United States District Court for the State of Utah entered an Order which materially impacts the ongoing Utah abortion litigation discussed in the State's amicus brief. Accordingly, the State of Utah hereby lodges 40 copies of the district court's Order with the Court. Three copies of the district court's Order, as well as this letter, have been mailed to all parties in No. 91-744.

The April 10 Order essentially grants the State of Utah's motion for summary judgment and dismisses most of the constitutional challenges to the 1991 Utah abortion regulations. Order at 7-13. However, the Order explicitly recites that the district court will await the Supreme Court's decision in this case before ruling on the privacy challenge to the Utah abortion regulations. Order at 13. The State of Utah believes that this information may be helpful to the Court in its deliberations.

Very truly yours,

Mary Anne Q. Wood

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Enclosure(s)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

JANE L., et al.	ORDERS VACATING TRIAL, GRANTING MOTION TO DISMISS & MOTION FOR SUMMARY JUDGMENT AS TO CERTAIN ISSUES, AND DETERMINATION THAT REMAINING ISSUES MAY BE DECIDED PURSUANT TO PENDING MOTION FOR SUMMARY JUDGMENT
Plaintiffs,	
v.	
NORMAN BANGERTER, et. al.	
Defendants.	Civil No. 91-C-345G

The posture of this case is that fully briefed and extensively argued motions to dismiss and for summary judgment have been submitted for decision and presently are under advisement. As a prelude to those motions, the parties engaged in extensive discovery. Various affidavits, deposition testimony and voluminous other materials have been submitted in direct support of and in opposition to the pending motions, so that both motions are being considered as summary judgment motions. In addition, the parties have prepared and lodged with the court summaries of all depositions which have been taken, as well as the depositions themselves, verified summaries of persons whose depositions were not taken, verified statements of direct testimony of the persons who were deposed and all exhibits which the parties rely upon. In this connection, the court referred all of the materials to the Magistrate Judge for review as to whether these constitute adjudicative facts relate to an actual factual dispute between the parties. Both before and since the

reference to the Magistrate the court has been examining the depositions, written summaries, exhibits and other documents which have been submitted in order to evaluate whether material facts are in dispute, which could prevent disposition of the case on the motions, or whether some or all of the legal issues can be decided pursuant to the motions, or whether a trial is necessary.

The materials which have been lodged with the court for the most part are very helpful and meaningful. These materials present extensive historical and medical facts about abortions, pregnancies, professional and expert opinions, statistics, social and economic data, information concerning religious, family and psychological impacts, research, child rearing, adoption, and many other helpful things. These all bear upon such things as balancing the liberty interest of women in making the choice to have an abortion against the state's interest in protecting unborn children, and the validity or invalidity of statutory exceptions in which the state has determined that abortions should not be prevented. This information can be of great assistance to the court in determining the legal issues which are presented here. However, for the most part, these are not the kinds of materials which relate to controversies to be decided at a trial. Rather, these are the type of materials which may require interpretation or evaluation of evidence to derive legal conclusions, or from which inferences from undisputed evidence may be made by the court in arriving at a decision on the legal

issues presented. Some of the materials would not be admissible under the rules of evidence such as those that are conclusory, based upon hearsay, or not relevant to the issues. Some are more helpful and pertinent than others. Nevertheless, the court has determined to look at and consider all of the non adjudicatory materials which have been submitted and to receive them as background facts which will be helpful in ruling upon the legal issues. There are no material disputed adjudicative or historical fact issues which relate to disputes of consequence to the resolution of the case. To the extent there is dispute as to issues of ultimate fact or mixed questions of fact and law, the court can and should make determinations and draw inferences therefrom.

It appears to the court that a sufficient record exists by reason of the many materials which have been submitted by the parties for the court to determine the legal issues in this case by way of summary judgment. Accordingly, the court makes and enters the following rulings at this time and reserves the right to expand these bench rulings and to issue follow up written opinions. Accordingly, it is

ORDERED, that the provisional trial date set in this matter is vacated. The court determines that a trial in this case is not necessary. No disputed material issues of adjudicative fact which relate to disputes of consequence to resolution of the case have been presented, and there is a

sufficient record, including undisputed evidence and non adjudicative evidence, from which the legal issues may be decided. The court is convinced that trial on the merits would reveal no additional substantial data. Hearing and viewing witnesses and subjecting them to crossexamination would not aid the determination since there are no issues of credibility or controversies of material fact concerning matters of consequence which are relevant and admissible in these proceedings. It is

FURTHER ORDERED, that the magistrate's Order of March 25, 1992, denying defendants' motion to strike materials submitted by plaintiffs in opposition to defendants' motion for summary judgment, which materials were classified by the magistrate as background information, is approved and adopted. The court has determined to consider the information as judicial information which may be helpful pertaining to the legal issues. Otherwise, with respect to materials which may constitute adjudicative facts, the magistrate's Order is taken under advisement relative to the issues which will remain under advisement. It is

FURTHER ORDERED, that recommendations of the magistrate as to live witnesses and non live witnesses are not directly adopted since these recommendations go to the scope of a trial which the court has determined to be unnecessary. However, those recommendations are taken under advisement as they might pertain to evidence and issues to be decided in connection with the

motion for summary judgment. To the extent that the magistrate's recommendations would prevent the court from considering testimony and exhibits which have been submitted by the parties as helpful information to assist the court in connection with determining legal issues, the recommendations are disapproved. Plaintiffs' objections and defendants' objections relative to these reports are overruled or are moot, except as may be consistent with this ruling. It is

FURTHER ORDERED, that plaintiffs' motion to reconsider the court's prior ruling of January 29, 1992, is denied. However, the court will take into consideration the testimony and evidence which has been submitted by the witnesses referred to in the motion as judicial information and background information which may be helpful in determining legal issues. It is

FURTHER ORDERED, that the magistrate's recommendation to permit live testimony of Dr. Ward on the so-called fetal experimentation ban on research is not approved. There is no need for a trial on this issue and it is taken under advisement. Whether the statute prohibits prenatal diagnostic and treatment procedures and research - and whether the term "experimentation" is so standardless as to violate due process requirements - are questions of law and the court has ample material before it to make that determination. It is

FURTHER ORDERED, that plaintiffs' proffered live testimony of plaintiffs individually or as representatives of

classes which have been certified is denied. Declarations have been filed by such plaintiffs, including pseudonymous individuals, in support of plaintiffs' application for preliminary injunction, in support of plaintiffs' motion for joinder of party plaintiffs, and in support of plaintiffs' opposition to defendants' motion for summary judgment. All are before the court and will be considered in connection with issues not otherwise ruled upon which are presented on summary judgment. Additional submissions would be cumulative, duplicative and unnecessary to decision on the legal issues. Live testimony would add little if anything. Having reviewed testimony which has been submitted, and there will be further review, the court expresses respect and empathy for the individual plaintiffs. However, there is no need for a trial simply to provide what the court already has. It is

FURTHER ORDERED, that the magistrate's ruling denying pending Motions to Compel is adopted in part and overruled in part. To the extent that the magistrate's ruling was entered in contemplation of a trial it is moot. To the extent that the magistrate's ruling has to do with discovery materials, it is also moot. As will be seen, the information sought is no longer relevant to any issues presented for decision because those issues are here determined. Proceeding by way of subpoena for trial purposes or any other purpose is not authorized at this time. Also, no further discovery may be conducted. The

discovery cut-off date is long since passed and it appears in any event that what the parties seek is immaterial to any factual dispute. The magistrate's dismissal of the motions with prejudice is clearly erroneous and therefore is disapproved, so that dismissal is without prejudice in the event of future proceedings. Otherwise, the magistrate's denial of motions to compel at this time is approved and adopted. It is

FURTHER ORDERED, that plaintiffs' motion to reopen depositions or in the alternative to submit further direct testimony is denied. It is

FURTHER ORDERED, that defendants' pending motion to dismiss is converted by the court to a motion for summary judgment. Even though plaintiffs argued the motion to dismiss as based only upon the allegations of the Amended Complaint, plaintiffs attached many materials in opposition to that motion, and defendants argued it both as a pure motion to dismiss and as a converted motion for summary judgment. However that may be, the court converts that speaking motion to dismiss into a motion for summary judgment. The court enters the following rulings with respect to federal constitutional issues raised therein and in defendants' motion for summary judgment. These rulings do not involve the privacy issues and certain other issues which will remain under advisement.

1. Vagueness

The court rules as a matter of law that provisions

of the Utah anti abortion statute set forth in Utah Code Ann. 76-7-302 (Supp 1991), subsections 2(a), (d) and (e) are not void for vagueness. Commonly accepted meanings of the terms "necessary to save the mother's life," "grave damage to the woman's health" and "grave defects" exist so that physicians of common intelligence can determine a core meaning as to the standard of conduct. In all events, since the statutory meanings are to be made in the good faith clinical and professional judgment of the attending physician, there could be no criminal prosecution under the law. The Utah laws relating to "medical emergencies" and fetal "experimentation" are not here ruled upon and are taken under advisement.

2. Establishment Clause

The court holds that recognition of rights in unborn children in Utah's Preamble does not constitute an establishment of religion in violation of the United States Constitution. The Utah preamble provides that "[t]he State of Utah has a compelling interest in the protection of the lives of unborn children." The Supreme Court has upheld a similar preamble in the State of Missouri.

This court also rules that regardless of similarities with LDS Church positions on abortion, Utah's Statute does not constitute establishment of religion. In affirming the trial judge in McRae v. Califano, a case in which it was claimed that the Roman Catholic Church exerted undue

religious influence, the Supreme Court said:

> [I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions' . . . . That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny."

McRae, 448 U.S. at 319.

Finally, this court holds that neither does the Utah statute offend the Establishment of Religion Clause as constituting an endorsement of religion. This court rules as a matter of law that the Utah statute does not convey a message of endorsement of religion. Manifestly, the statute is as consistent with society's traditional moral framework as it is with any one or several religions.

3. Free exercise - Free speech

This court holds that the Utah statute as a matter of law does not interfere with free exercise of religion. In a controlling recent case the Supreme Court rejected use of the Free Exercise Clause to "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability' on the ground that the law proscribes . . . conduct that his religion prescribes . . ." Employment Division v. Smith, 494 US. 872, 879 (1990). An apparent exception exists involving so-called "hybrid" rights where other constitutional rights such as free speech in combination with free exercise of religion would

constitute a violation of the free exercise clause. In this case, there is no free speech violation because there is no free speech right to solicit criminal acts. As the Supreme Court has said, "'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" Osbourne v. Ohio, 495 U.S. 103, 110 (1989).

Another argument is asserted by some clergy plaintiffs: that not to provide abortion counselling - even of the active and facilitating type which might amount to conspiracy to break the law - would interfere with their right to the free exercise of religion. However, as we have seen, the Supreme court has upheld valid neutral laws of general applicability - that is, laws which are not specifically aimed at interference with free exercise of religion even though that right might be abridged in the application of the law.

For the foregoing reasons, this court rejects the contentions that the law violates the constitutional prohibition against interference with the free exercise of religion. In this facial challenge case, it follows that the counsellor, clergy, and doctor plaintiffs whose only role is to provide counsellor type information should be and are dismissed. Valuable and thoughtful information submitted by these now dismissed parties will be considered by the court as background and judicial

information in connection with matters taken under advisement.

4. Involuntary servitude

In their Sixth Cause of Action, plaintiffs allege that the Utah Act violates the Thirteenth Amendment. The Thirteenth Amendment declares that "[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Plaintiffs argue that prohibiting elective abortions forces women into "slavery" or "involuntary servitude" by carrying a child to term. In 1897 the Supreme Court held that this amendment "was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards." Robertson v. , 165 U.S. 275, 282 (1897). More recently, the Supreme Court observed that "in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction." United States v. Kozminski, 487 U.S. 931, 943 (1988) (emphasis added).

It strains credulity to equate the carrying of a child to term with "compulsory labor," and the argument borders on the frivolous. In all events, however, the Utah statute does not create a situation where the woman has no available choice but to

bear the child or be subject to legal sanction. No criminal penalties at all apply to a woman who chooses to abort by going to another state that permits abortion.

This court holds that the Utah statute as a matter of law does not violate the constitutional prohibition against involuntary servitude.

5. Equal Protection

Plaintiffs' Fourth Cause of Action alleges that because only women's reproductive choices and rights to bodily integrity are being denied, the Utah Act discriminates on the basis of gender in violation of the Fourteenth Amendment to the United States Constitution. Again, the Supreme Court has ruled against this kind of challenge. In Michael v. Sonoma County Superior Court, 450 U.S. 464, 469 (1981), the Supreme Court said, "this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." This court holds that the Utah anti-abortion statute does not violate the Equal Protection Clause.

Based upon the foregoing, defendants' motion to dismiss and portions of defendants' motion for summary judgment are granted, and plaintiffs' First Cause of Action to the extent heretofore discussed, and plaintiffs' Fourth, Fifth, Sixth and Seventh Causes of Action are dismissed as concerns claims arising under the United States Constitution. All clergy plaintiffs, all

counsellor plaintiffs, and all medical plaintiffs whose only role is to provide counsellor type information and who do not themselves perform abortions are dismissed. It is

FURTHER ORDERED, that plaintiffs' motion to voluntarily dismiss claims asserted under the Utah Constitution is taken under advisement. The privacy claims and certain claims pertaining to Utah's pre-existing abortion statutes are also taken under advisement. These claims will be ruled upon pursuant to the pending motion for summary judgment in due course after careful review of the applicable record.

The Supreme Court in the Casey case now before it will determine the level of scrutiny to be applied to statutes restricting abortion. Although the Utah statute involves an abortion ban based upon the state's declared compelling interest in unborn children, the new standard of review likely to be announced by the court will be of great relevance to this case. The fully developed record which exists here is such that when the Supreme Court makes that determination we will be in a position to apply that new standard of review and thus determine the remaining issues.

The standby hearing and trial set for April 21, 1992 is vacated. All remaining matters are under advisement.

DATED: April 10th, 1992.

J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

COPIES TO: